against the admissibility of the certificate on the ground of want of authority, it seemed to me that the challenge should have been made at the latest when the certificate was adduced in evidence. At this stage, in a proper case, an adjournment could always be considered, for process to be taken to ascertain the authority of the certifier.

In passing, I would remark that perhaps all this could be avoided if the authorisation was gazetted.

There appears to me to be presumptive support for the view I have taken in section 79 of the Evidence Act. The section which was relied on by the learned president sessions court who tried this case reads

79(1). The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in Malaysia who is duly authorised thereto:

Provided that the document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in the document.

If I may with respect adopt the phrase of Spenser-Wilkinson J. (as he then was) in *In re Tan Ah Chuan & Anor.*[3] in respect of another clear provision of the Evidence Ordinance, the words of section 79 are "too clear to admit any gloss on them." The court shall presume that the Deputy Governor who signed the certificate held when he signed it the official character which he claimed in the document: see also, *Mohamed Hanifah* v. *Public Prosecutor.*[4] It is, as all presumptions are, rebuttable but in the absence of any such evidence, remains the substantive evidence on which a court can act.

If I am wrong in my application of section 79 of the Evidence Act or in my construction of section 428 of the Criminal Procedure Code, there is in my reading of the notes of evidence, sufficient evidence apart from the certificate of forgery. The currency notes in this case lack the security thread which since its first appearance has been woven into the paper used to print the notes and which is about the most difficult thing to reproduce. Without this security thread, the notes could not be genuine.

Now this thread does not obviously belong to that class of "secret marks or indicia which experts know to look for on genuine notes" as in the case of *Rex* v. *Wong Kiang Chin, supra* and which it would clearly be against public policy to reveal. There is no secrecy about it. It is large enough to be seen by the naked eye. It is palpable. And it is sufficiently notorious for anyone accepting a currency note to look for it, in the same way as one looks for a water-mark, as a test for its authenticity.

Also, the case was tried by the president who sat as a judge of law as well as of facts. It was not a jury case, as in *Rex* v. *Wong Kiang Chin, supra* and therefore the reasons given by McElwaine C.J. for the rejection of the suggestion that the jury could judge for themselves that the notes were forged are not strictly applicable.

In such a case

"it is the duty of an appellate court to be in judge of fact as well as of law,"

per Terrell Ag. C.J. (Straits Settlements) in *Chia Han Kiat* v. *Public Prosecutor.*[5] This duty is applied, as in *Chia Han Kiat's* case to upsetting a judgment which on a review of all the evidence was clearly wrong and must be applied at the other end to a consideration whether all the admissible evidence adduced in a case established facts which would support a conviction. In this case the notes were so obviously forged that they must even without the certificate of the Deputy Governor be seen to be forgeries and once possession was proved and there was further proof of dealing on the basis of forged notes, then a *prima facie* case must be held to have been established.

On possession, the evidence which was attacked came mainly from witnesses whom the president correctly held to be accomplices. He expressed himself after warning himself duly of the dangers of so doing, as entirely willing to accept this evidence and convict on it. But this evidence was largely corroborated by the evidence of another inmate of the house to which the appellants had brought the forged notes, whom even the defence could not accuse of being an accomplice. There was therefore on the record independent corroboration of accomplices' evidence. The corroborated evidence also established dealing of the notes as merchandise and not as legal tender.

Other grounds of appeal were all minutiae, as for example, why had the police not recovered the paper wrapper in which the notes were brought. They are without substance.

The appeal is dismissed. The sentence is confirmed.

Appeal dismissed.

Solicitors: *Yeap & Co.; R. Rajasingam & Co.*

CHOO AH PAT v. CHOW YEE WAH & ANOR.

[O.C.J. (Abdul Hamid J.) November 26, 1973]
[Kuala Lumpur — Civil Suit No. 469 of 1971]

Personal Property — Joint account opened by deceased with first defendant for the benefit of his wife — Whether deceased was of sound mind at time cheque drawn up — Burden of proof — Presumption — Undue influence — Whether authority given by deceased revoked by his subsequent mental condition — Duty of banker — Rule of survivorship whether overriden by equity — Forgery — Fraud — Completely constituted trust — Contracts (Malay States) Ordinance, 1950, s. 16(1).

Evidence Act, 1950 (Act 56), s. 114(d) — Presumption in favour of continuance — Presumption of sanity — Burden of proof.

In this case the deceased had prior to his death drawn a cheque for $60,384.80 and paid it into a joint account which he opened in his name and that of the first defendant for the benefit of his wife. The action was brought by the administratrix of the estate of the deceased to claim recovery of the said sum on the ground *inter alia* —

(a) that the cheque was not the deceased's cheque;

(b) that it was obtained by exercising undue influence on the deceased when he was of unsound mind, memory and understanding;

(c) that the documents were obtained by fraud;

(d) that assuming the cheques and documents were valid —
  (i) the authority given by the deceased to open the joint account was revoked by his subsequent mental condition;
  (ii) the rule of survivorship was overriden by equity;
(e) that the deceased's signature on the cheque was a forgery.

Held: (1) the burden of proving that the deceased was not *compos mentis* at the time when he drew the cheque and executed the document lay with the plaintiff and on the evidence, the conclusion was that he was then of sound memory and understanding and that he fully appreciated the nature and effect of his act;

(2) the plaintiff had failed to produce any evidence from which the court could reasonably conclude the exertion by the defendants of undue influence on the deceased;

(3) no evidence had been adduced to substantiate the allegations of fraud;

(4) the authority given by the deceased to open the joint account was not revoked by the deceased's subsequent condition as it was not established that deceased was subsequently completely deprived of his full mental capacities;

(5) as in this case the intention of the deceased was to benefit his wife, the first defendant as the survivor was entitled to the balance standing in the joint account, not for himself and not for the estate but for the widow;

(6) there was a completely constituted trust in favour of the widow.

Cases referred to:-

(1) *Mohamed Yakob bin Abdul Quddus* A.I.R. 1923 Patna 187.
(2) *Noriah* v. *Shaik Allie* (1928) 1 M.C. 79 at p. 107.
(3) *Banks* v. *Goodfellow* (1870) L.R. 5 Q.B. 549.
(4) *Smee* v. *Smee* (1879) 5 P.D. 84.
(5) *Harwood* v. *Baker* (1840) 3 Moo. P.C. 282.
(6) *Russel* v. *Scott* 55 C.L.R. 440 at p. 450.
(7) *Milroy* v. *Lord* 45 E.R. 1185.

CIVIL SUIT.

Joginder Singh for the plaintiff.

M. Shankar for the first defendant.

Chan Siew Yoon for the second defendants.

Abdul Hamid J.: This is a claim brought by the plaintiff Choo Ah Pat against Chow Yee Wah the first defendant and Kwong Yik (Selangor) Banking Corporation, Limited the second defendants.

The plaintiff is alleging —

(a) that cheque No. A043382 for $60,384.80 purported to be drawn on July 18, 1967 on the second defendants by her son Loke Yaik Hoe who died on the morning of July 24, 1967 was invalid and of no effect as the cheque —
  (i) was never and is not the deceased's cheque, and/or
  (ii) was obtained from the deceased by the first and/or second defendants their servants or agents by exercising undue influence on the deceased and/or when the deceased was of unsound mind, memory and understanding and/or was fraudulently raised by the first and/or the second defendants their servants or agents;
(b) that the documents purportedly executed by the deceased on July 20, 1967 whereby the deceased was alleged to have opened a joint account with the first defendant (Account No. 1-361) on July 20, 1967 at the second defendants' sub-branch No. 55, Jalan Pasar, Kuala Lumpur were invalid and of no effect for the said documents were —
  (i) never and are not the documents of the deceased;
  (ii) obtained from the deceased by the first and/or second defendants their servants or agents by exerting undue influence on the deceased and/or when the deceased was of unsound mind, memory and understanding, and/or
  (iii) forgeries or false documents and fraudulent documents concocted for fraud by the first defendant and/or the second defendants their servants or agents;
(c) Alternatively if the court should hold that the said cheques and documents were validly and lawfully drawn and executed by the deceased that —
  (i) the authority given to the second defendants to honour the said cheque and/or to open the said joint account was revoked by the subsequent mental condition and/or mental disorder of the deceased and/or by the deceased becoming unsound of mind, memory and understanding;
  (ii) the rule of survivorship at law (if any) and/or the directions given in the said documents as regards the survivor of the deceased and the first defendant being entitled to the monies standing to the deceased's credit in the said joint account at the time of the deceased's death was and has been overridden by equity.
(d) that the deceased's signature (or thumbprint) on the alleged cheque No. A 043382 for $60,384.80 was a forgery and/or unauthorised signature within the meaning of section 24 of the Bills of Exchange Ordinance, 1949;
(e) that the first and/or the second defendants were not holders in due course of the alleged cheque No. A 043382 and/or had a defective title thereto at all material times.

The plaintiff is asking the first and/or the second defendants to refund the sum of $60,384.80, the value of the alleged cheque or the sum of $57,382.30 standing to the credit of the joint account at the time of the deceased's death on July 24, 1967 as having been unlawfully withdrawn by the first and/or the second defendants.

Alternatively the plaintiff is claiming a sum of $60,384.80 being the value of the alleged cheque No. A 043382 against the first and/or the second defendants for having converted the sum for his and/or their own use and for wholly depriving the deceased and/or his estate of the same.

The plaintiff also claims against the second defendants for a sum of $60,384.80 for monies had and received for the use of the deceased and/or his estate.

Briefly the facts are as follows. The deceased Loke Yaik Hoe was the son of the late Loke Chow Kit and the plaintiff. When the late Loke Chow Kit took the plaintiff as his wife he was then already married to one Chan Yuen Lin with whom he had nine children. One of Chow Kit's daughters is the wife of the first defendant. Kwan Mun Koh represent-

ing the second defendants is a nephew of the deceased. He is an officer of the Kwong Yik Bank, Pasar Road.

Loke Yaik Hoe was admitted to the General Hospital, Kuala Lumpur on July 13, 1967. A few days before he died, a joint account between him and the first defendant was opened at the Kwong Yik Bank Pasar Road Branch. On July 18, 1967, the deceased purportedly drew a cheque in favour of Kwong Yik Bank on his account No. 4-267 with the Head Office for a sum of $60,384.80. He also purportedly executed certain documents authorising the opening of the joint account. The said sum was transferred to the joint account on July 20, 1969.

From the pleadings, it is revealed that the main issue before this court is whether the deceased was of sound mind, memory and understanding when he drew, if he did, cheque No. A 043382. The plaintiff is asking the court to conclude, primarily on the strength of medical evidence, that the deceased was suffering from some unsoundness of mind that he did not know the nature of his act when the thumbprint was affixed on the cheque and the other documents.

I would at the outset consider whether the thumbprint on the cheque was that of the deceased. Although the plaintiff is alleging that the thumbprint on the cheque is a forgery, no particulars have been set out and no evidence adduced to support the allegation. And, in regard to the thumbprints found on the mandate and the specimen cards, no allegation is made that they were forged. The plaintiff does not in fact dispute that those thumbprints were that of the deceased. By consent, the thumbprints on the cheque, mandate and specimen cards were sent to the Pendaftar Penjenayah Malaysia & Singapura for verification. After carrying out comparison, the Pendaftar Penjenayah certified that the digital impressions found on all the documents are identical with one another and they belong to one and the same person. On the strength of the report and the evidence before me, I am satisfied that the thumbprints on the cheque, the mandate and the specimen cards are those of the deceased.

The plaintiff is also alleging that the thumbprint was affixed on the cheque just immediately before or just immediately after the deceased's death. Here too there is not an iota of evidence to support the allegation. In fact sufficient evidence exists to establish that the cheque and the documents were already in the possession of the second defendants a few days prior to the deceased's death.

The cheque in question was in fact cleared by the defendant bank on July 20, 1967, and the $60,384.80 was transferred to the joint account on the same day. (See exhibit P34). To my mind, the thumbprints on the cheque and the documents must have been affixed either on or before July 20, 1967.

It is to be observed that the plaintiff has not adduced any evidence whatever to show when these thumbprints were affixed. On the other hand, the defendants produced evidence to show that the thumbprints were affixed on July 18, 1967.

I shall now examine the medical evidence adduced by the plaintiff. Altogether, five doctors were called.

Dr. Vellupillai, a lecturer at the University of Malaya attached to Medical Unit 1, General Hospital, Kuala Lumpur, stated that when the deceased was admitted to the ward on July 13, 1967, he (the deceased) was suffering from hypertensive congestive cardiac failure and cardiac cerrhosis. The deceased had raised blood pressure and a malfunctioning of the heart as a result of which he could not push out his blood properly to the various organs in the body. He also suffered from chronic malfunctioning of the liver resulting from the malfunctioning of the heart.

Dr. Vellupillai referred to the clinical notes recorded at 4.40 p.m. on July 13th which state —

"*History:* Patient was ill for two months. Dyspoena on exertion for two months. Paroxysmal nocturnal dysphoea also for two months. No haemoptysis. Patient was known to be diabetic for ten years but at that time was not on treatment for diabetes. Was a known hypertensive since 1948. I could not ascertain whether he had treatment for hypertension or not. On physical examination patient was ill not cyanosed jaundiced. He was dyspnoeic. His pulse rate was 96 per minute with occasional missed beats. His blood pressure 150-190. His jugular venous pulse was raised. He had ankle oedema. His lungs were on auscultation bilateral vasal crepitus. On auscultation of his cardiac vascular system his dual rythm no murmurs. His abdomen was soft. His liver and spleen were not palpable. He had ascites. He had liver palms. Diagnosis hypertensive cardiac failure."

He ordered certain tests to be carried out and prescribed the following treatment —

"(1) digoxin;
(2) 0.25 milligramme twice per day;
(3) injection mersalyl 2 c.c. every other day for 5 doses;
(4) chlorothiazide 500 m.g. on that day and every morning: and
(5) potassium chloride 1 gramme 3 times a day."

He further testified that the patient had difficulty in breathing. The pulse rate was 96 per minute which was abnormal and the blood pressure was on the low limit of abnormal. The deceased had swelling around the ankle, a sign of failure of the heart. There was also abnormal signs of showing failure of the left side of the heart. Other signs of cardiac and liver malfunction include the presence of fluid in his abdomen. The fluid was not marked enough to cause any effect on the deceased.

In answer to a question put by the plaintiff's counsel as to the general condition of the deceased on admission, Dr. Vellupillai said that the deceased was a very ill patient. He showed signs of cardiac and liver failure. The deceased was not able to answer some questions, e.g., if he had been treated for high blood pressure. He was not fully clear mentally on the questions put to him.

Dr. Lim Ewe Jin a physician at the Lady Templer Hospital, Kuala Lumpur, attached to the General Hospital Medical Unit 1 testified that he first saw the patient on July 15, 1967. He did not record any clinical notes but only referred to the notes made by the other doctors.

On July 15th the deceased's condition was clinically the same. There was mental deterioration and the deceased was hesitant intellectually. He did not make any notes but saw the deceased almost every day. The only note he made was on July 20th as follows —

"Dear Mr. Sreenivasan,
This is the patient I discussed with you regarding peritoneal dialysis. His hypertensive failure is under control but his blood urea has gone up to 360 m.g. per cent."

Dr. Lim referred to the results of the tests that were performed. As for liver function the results indicated that there was intrinsic damage of the deceased's liver. It was, however, still functioning. The overall results of blood urea tests (page 45 of Notes of Evidence) indicated that the deceased's kidneys were damaged and there was progressive deterioration of the kidney function. Dr. Lim explained that mental deterioration and hesitant intellectually meant that the patient was mentally confused and was not able to converse intellectually. It indicated impairment of the mental faculties at the time.

As for July 14th, Dr. Lim said that there was progressive mental deterioration in the deceased's condition and he expected further progressive mental deterioration. Asked whether he remembered seeing the deceased on 17th, 18th and 19th, Dr. Lim said he remembered seeing the deceased between those dates but he could not remember the specific dates. He recalls that the general condition of the deceased was the same as when he first saw him. Dr. Lim referred the deceased to Mr. Sreenivasan because some of the blood tests showed that the kidneys were failing rapidly.

Mr. Sreenivasan a surgeon at the General Hospital, Kuala Lumpur, an expert in the field of surgery, said that he saw deceased on July 20th when the case was referred to him. He made a note as follows —

"I really do not think this is at all a suitable case as he is a case of mental dementia. It is difficult to get him to lie down in bed. He is insistent on sitting up in bed. It would be difficult to continue dialysis."

He explained that when he examined the deceased on July 20th at 10.15 p.m., he found it difficult to get him to lie down. Deceased was insistent on sitting up. Mr. Sreenivasan described the degree of mental deterioration as being to the point of being restless. Deceased was getting up and lying down on the bed constantly. In his view, deceased could not understand what he was trying to tell him. Dr. Sreenivasan attributed the cause of it to mental dementia. According to him, the facts are associated with high blood urea and the retention of fluid that cause swelling of the brain and they are responsible for mental dementia. The other factor is the acid accumulation. Asked whether he would expect the deceased's mental condition to remain static or to become worse, he replied that it was difficult to assess the degree of mental deterioration. Mr. Sreenivasan emphasized that he could only give an assessment of the deceased's condition from what he had seen in the deceased in his time. He expressed the view that the patient was not in normal full possession of his mental faculties at 10.15 p.m. on July 20th at the time of examination. He, however, qualified by saying, "This is very difficult to judge. Certainly he was not in full control of his mental faculties but as to what extent and what degree, it is difficult to judge." Mr. Sreenivasan also expressed the view that the deceased could not talk rationally. He, however, made it clear that he did not have a long conversation with the deceased because the deceased's mental dementia did not permit him to have conversation or discuss any problems. In his opinion, he would not, if someone had come to him wanting the patient to execute a document, certify that the deceased was in his proper frame of mind to do so.

Datuk (Dr.) Sinnadurai, Senior Consultant Physician attached to the General Hospital, Kuala Lumpur, said that he was responsible for all patients admitted to Medical Unit 1. Loke Yaik Hoe was admitted as a case of medical urgency referred by a medical practitioner because the patient had difficulty in breathing and general weakness. The patient also had swelling of the leg and cardiac failure. The patient was rushed in because he was showing signs of congestive cardiac failure needing urgent attention to make him more comfortable.

On July 14th the patient was in distress, short of breath and restless. On July 15th there was some mental deterioration. Intellectually he was somewhat hesitant in answering questions. There was, however, improvement in the patient's general condition because of treatment given. Generally he was feeling better. He explained that mental deterioration signified a certain amount of impairment of mental acuity in the manner he was able to answer questions. He was rather dull and not alert. The general clinical picture was also contributed by kidney and liver failure.

On July 18th the patient was mentally confused, more drowsy and clouded in his answers. Asked by plaintiff's counsel whether this condition of drowsiness and clouded answers continued to July 18th, Dr. Sinnadurai said that in this uraemic condition, there can be periods of transient ups and downs occurring — a condition that waxes and wanes. On July 19th the deceased's clinical state became worse particularly on the 19th night when deceased started pulling out all the tubes that had been inserted. Dr. Sinnadurai felt that this was evidence of psychotic behaviour. He attributed this to intoxication caused by the waste product retained in the blood.

Dr. Sinnadurai was further of the view that the deceased's general condition grew worse day to day in spite of attempts to make him comfortable. Counsel for the plaintiff asked Dr. Sinnadurai whether he would, on July 14th, certify that deceased was in proper mind to execute documents. He replied saying that straightaway he would not, but he would have to have a further look at deceased and carry out investigation first. This would also depend on the type of document to be executed. He, however, qualified by saying, "That condition waxes and wanes and these people who are suffering from kidney condition present a picture of health but one would only realize how ill they are by looking at the finding."

Dr. Sinnadurai is of the opinion that he would hold the same view on the other days, that is 16th to 20th July if someone had asked him to certify. Commenting on the patient's consciousness, Dr. Sinnadurai said that he would not agree if someone had said that deceased was conscious throughout but he felt that there could have been certain transient periods when deceased might have been alert for a little time.

Dr. Sinnadurai also testified that deceased looked better on July 21st compared to 18th, 19th and 20th when deceased appeared drowsy, refusing to take food and drink.

Dr. Daljit Singh was the last doctor to testify. Briefly, he stated that he attended to Loke Yaik Hoe who was in Ward 19A. Before that the patient was in Ward 20. He made his first note on July 17th as follows —

"Feeling better. Not dyspnoeic. No ankle oedema. Heart — dual rythm. Lungs clear. Blood urea 168 m.g. per cent done on 13.7.1967."

The patient's condition was better compared to the previous day's. On 18th he made the following notes —

"Confused. Blood urea 252 m.g. per cent. Heart dual rythm. Heart clear."

There is a further note to say — "Repeat blood urea and serum electrolitis." Dr. Daljit reviewed treatment on that day. He stated that the blood urea on July 18th was very high. It was raised from 168 m.g. to 252 m.g. per cent, an indication that the kidneys were failing. Deceased's confusion was the effect of raised blood urea.

By "confused" Dr. Daljit said, he meant deceased was not able to answer questions relevantly partly because he was unable to appreciate fully what the questions were. He, however, made no record of the questions he asked.

He further stated that complex and multiple factors on July 18th would affect deceased's mental state. Nevertheless, he conceded that he had not made any record pertaining to his mental state other than the fact that deceased was confused.

Referring to intake and output chart, he stated that there is a record showing that deceased had passed urine in bed and on the floor. Although no note was made to show that deceased was unable to control bladder function, he believed that deceased had a damaged nervous system whereby he lost control of his bladder function. It could also mean that deceased's state of mind was such that it did not matter to him where he emptied his bladder.

Dr. Daljit referred to the nursing notes to the effect that on July 18th in the morning, deceased was fairly ill and drowsy-looking, in the afternoon deceased's general condition was ill and drowsy, sleeping on and off, and at night deceased's general condition was fair. He commented on the overall mental state having regard to the clinical notes as well as the nursing notes stating that deceased was confused and in such a state of mind that he did not know what he was doing.

On July 19th deceased's general condition was worse than on the 18th and his mental condition deteriorated further along with his physical condition. On July 20th, however, compared with the condition the night before, he was drowsy in the morning but slightly brighter.

Referring to deceased's refusal to take food and drink and the pulling out of the catheter, Dr. Daljit expressed the view that deceased did not know what was being done for him.

On July 21st deceased looked brighter than on the previous day and he was not as drowsy.

Cross-examined by Mr. Shankar, Dr. Daljit admitted that he would not have remembered anything about this patient if he had not seen the nursing notes. He believed he spent a fair amount of time with deceased realizing his condition. When counsel suggested that to assess the mental condition of a person, it was an advantage to know the person a long time prior to this, Dr. Daljit disagreed. He stated that from deceased's condition, there were sufficient mental changes that such knowledge would not have made any difference.

Commenting on the output of urine, Dr. Daljit stated that the combined effect of mersalyl and chlorotiazide injection was to produce output of urine and he agreed that the passing of urine into a container required deceased's co-operation and for deceased to pass urine in the toilet, he knew what he was doing. Mr. Shankar drew Dr. Daljit's attention to the record showing visits to the toilet on the 16th and 17th and the collection of 10 ozs. of urine from 7.00 a.m. to 1.00 p.m. on the 18th. Commenting on it, Dr. Daljit said he might have been aware he was passing urine.

Dr. Daljit did not deny that he made no note as to the patient's condition on the evening of July 16th. When Mr. Shankar suggested to him that the description of "drowsy" would not apply to a person who was capable of walking to the toilet to ease himself and come back, Dr. Daljit said that it could, depending on the degree of drowsiness. "Deceased could stagger to the toilet and get back but whether he would know what he was doing depends on how complicated the act involved was."

Counsel also drew Dr. Daljit's attention to an entry made by the nurse observing that deceased was a very obstinate person and a further entry stating that deceased refused to listen to instruction and would not maintain complete rest in bed. Dr. Daljit commented that it was difficult to say whether he did not listen or did not get the message. He, however, conceded that on July 18th, the patient complained of cough, indicating that he was able to communicate.

Dr. Daljit confirmed that there was an entry on July 17th that deceased's condition was fair and that although there was an entry on July 18th that he was ill and drowsy, the last entry stated that his general condition was fair.

He further confirmed that on the morning of July 19th, although deceased was asked to have complete rest in bed, he was unco-operative. An entry was made to the effect that deceased's general condition was fair. There was a further entry stating that deceased got out of bed and stood at the window.

Physically deceased was able to move around by himself at that time. Commenting on an entry on July 20th that the patient insisted on sitting up in bed and refusing to lie down, Dr. Daljit said that it would appear there was some difficulty in getting across to the patient. He concluded from the notes of July 18th and 19th mornings that deceased was confused and did not get the message although he admitted that he did not perform psychiatric tests. Referring to the treatment of eigoxin, he stated that

one of the side effects of eigoxin was mental confusion but the degree would depend on the total doze. As to the catheter that had been inserted, he agreed that it was physically uncomfortable and there are patients who do not like a catheter to be inserted and they could pull it out themselves.

Re-examined by counsel for the plaintiff as to the rise of blood urea from day to day, Dr. Daljit stated that in a patient in whom blood urea rises rapidly over a period of a few days, it would have an effect on his mental state. He added that severe liver damage also affects the mental state.

Confirming what he said under cross-examination, Dr. Daljit stated that he was unable to confirm or deny that deceased did not know what he was doing when he went to pass urine in the toilet before the 15th. It was only his inference that deceased did not get the message.

Before I proceed to make my finding, I would at this juncture pause to consider the onus of proof. Mr. Joginder Singh submitted that the law in regard to mental capacity should be that applicable to cases of mental disorder. He contended that where a person has been proved to have been so mentally disordered as to be incapable for purposes of disposition of property, the law presumes such a condition to continue until it is proved to have ceased. The presumption is founded upon section 114(d) of the Evidence Act, 1950, which provides that —

"The court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things shall cease to exist, is still in existence."

He drew my attention to a passage in *Sarkar* on Evidence, 12th edition, page 991 which states that —

"The illustration is founded on the presumption in favour of continuance or immutability. It is a very general presumption founded on the experience of human affairs, that persons, states of mind or things once proved to have existed previously or subsequently in a particular state are to be understood as persisting in continuing in that state until the contrary is established by evidence either direct or circumstantial."

He also drew my attention to a passage in *Halsbury's* Laws of England, 3rd edition, volume 29, page 419 paragraphs 819 and 820 which state —

"Every man is presumed to be sane until the contrary is proved, and this presumption holds as well in civil as in criminal cases, though in the case of a will it is the duty of the executors or any other person setting up the will to show that it is the act of a competent testator.

Where a person has been proved or is admitted to have been mentally disordered as to be incapable for purposes of contract or disposition, the law presumes such a condition to continue until it is proved to have ceased;"

Mr. Joginder Singh submitted that the burden of proving recovery from mental disorder or lucid interval lies on the person alleging it.

With respect I disagree. To my mind, the presumption would only arise when a state of things has been proved or is admitted to be in existence. The burden of establishing the existence of the state of things lies with the person making such allegation. In the instant case, the onus rests with the plaintiff to establish that the deceased was suffering from mental disorder. There was no evidence to show that deceased suffered from mental disorder prior to or on admission to the hospital. Whilst in the hospital his mental state was attributed mainly by the facts associated with high blood urea and the retention of fluid causing swelling of the brain, and it was not, as the doctors themselves testified, something static. Dr. Sinnadurai described the mental state as a condition that waxes and wanes.

Though there was evidence of some mental confusion, its degree was never established. There was also insufficient evidence to justify a finding that deceased was at all time in the state of mental confusion. Furthermore, I am not satisfied that there was no probability of any alteration in his mental condition. The burden should not therefore be shifted to the other party to show that at the material time such mental state ceased to exist. To fortify my view, I cite the following passage in *Sarkar* on Evidence, 12th edition, page 991 where it is stated that —

"The drawing of such presumption results in casting the burden of proof on the party against whom the presumption is raised. If a thing or a state of things is shown to exist and the space of time for which it existed is such that there is a probability that there has been no alteration in its conditions, the burden is on the opposite party to show that it has ceased to exist."

I wish to observe that care must be taken when dealing with a general proposition as a rule of evidence for general application as there is this further rule that every man is presumed to be sane until the contrary is proved. It is true that there is this presumption of mental disorder for purposes of contract or disposition where a person has been proved or is admitted to have been mentally disordered as to be incapable for such purposes but whether the presumption is raised in any given case will, I think, depend principally upon the facts of that particular case.

It is also Mr. Joginder Singh's contention that the proposition has equal application to gifts made by a person of unsound mind and a disposition made by such person is absolutely void. The court need not, I think, at this point, concern itself with the effect of the disposition. Having found that the presumption does not arise, the burden therefore, rests on the plaintiff to show that deceased was of unsound mind at the time when he made the disposition.

Mr. Chan Siew Yoon counsel for the second defendants argued that in view of the presumption in favour of sanity, the person who relies on unsoundness of mind must therefore prove it. He drew my attention to the Indian case of *Mohamed Yakob bin Abdul Quddus*.[1]

In that case, a ninety-six year old father purchased the property in the name of his son with the intention that it be a gift to him. An unsuccessful attempt was made to set aside the gift on ground of unsoundness of mind. On the question of on whom the onus of proof must fall, Jwala Prasad J. said at page 192 —

"... There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy the test... There weakness of mind is not sufficient...." "Assuming that Imdad Hossain was suffering from occasional aberrations of mind, as has been sought to be proved by the plaintiffs, the plaintiffs must further show that the particular transactions in question were entered into when he was subject to those occasional fits. There is no evidence that the documents in question

were executed at a time when Imdad Hossain was suffering from any hallucination of his brain. There, the documents in question were not executed when he was 'insane' ...".

I am inclined to agree with Mr. Chan's submission. The court is also of the view that the burden of proving the deceased was not compos mentis at the time when he drew the cheque and executed the documents, lies with the plaintiff. The court is further of the view that the question is purely one of fact. On the evidence given by medical witnesses, I do not think it can be challenged that the deceased was suffering from a serious illness. On admission to the General Hospital, he was suffering from hypertensive congestive cardiac failure with cardiac cerrhosis and prior to admission, he was ill for at least two months. However, there was absolutely no evidence, indeed it is never alleged, that he was suffering from any mental disorder.

Counsel for the plaintiff reviewed the evidence at some length and submitted that the independent medical testimony viewed in the light of all the circumstances of the case has established the plaintiff's charges of unsound mind and memory to the hilt.

I have scrutinized the evidence very carefully and I feel that whilst it is true to say that the medical witnesses were able to testify as to the general mental condition of the deceased, none of them could say exactly what the deceased's frame of mind was at the time when he purportedly drew the cheque and executed the documents.

Dr. Vellupillai, for instance, made it quite clear that he could not give any definite answer as he did not examine the deceased's mental state when asked by Mr. Joginder Singh whether he could testify the deceased was in a proper frame of mind to execute certain documents if someone wanted him to do it. It cannot, I think, be denied that the deceased had suffered some impairment of his mental faculties as a result of the serious illness to the extent that he was unable to converse intellectually but it is also evident that the deceased's mental condition had not remained static. Dr. Lim said that the condition was at variance — on some days he was more confused but on some other days less but on the whole there was progressive mental deterioration. Explaining what he meant by mental deterioration, Dr. Lim said that it meant mentally confused, not orientated and not aware of his surroundings. Asked to explain why he said the deceased was confused, he told the court that this was his general impression at that time. The deceased according to him was mentally dull. He further told the court that on July 19th and 20th, the deceased was able to speak. In fact he even went further to say that deceased was able to speak at all times. Although the deceased was mentally confused when he examined him, it was possible he could have been in a clear state of mind at other times.

Dr. Lim also expressed the view that the deceased could sign a cheque and that though the deceased was confused, he could understand. This answer was given in reply to my question to clarify whether with reference to mental confusion he meant the deceased did not know what he was doing or understand the nature of his act.

When asked by Mr. Joginder Singh whether he would certify the deceased could execute a document if on July 15th, 16th, 17th, 18th and 19th, someone had come to him wanting the deceased to do so, Dr. Lim stated that he was not in a position to say whether at any one time during or between July 16th and 19th, the deceased was in a proper frame of mind to execute a document.

In answer to the question whether the deceased was conscious from the time he was admitted to the time he died, Dr. Lim said the deceased was conscious initially. Subsequently at a certain stage there was progressive mental deterioration. Dr. Lim felt that the deceased was not in full possession of his mental faculties throughout but he qualified by saying that whether or not the deceased was in full possession of his mental faculties would depend on the time of examination. When he examined the deceased on July 15, 1967, he was of the view that the deceased did not possess full mental faculties. That, he said, did not exclude the possibility that he could have been in possession of his full mental faculties at other times.

Mr. Sreenivasan in his testimony made it quite clear that it was difficult to assess the degree of mental deterioration. He could only give an assessment of the deceased's condition from what he observed at the time of examination on July 20th. It is also evident that Mr. Sreenivasan spent very little time with the deceased.

Datuk (Dr.) Sinnadurai also testified as to the deceased's mental condition. In his view, there could be periods of transient ups and downs — a condition that waxes and wanes. It is not something that is static all the time and it is difficult to say what his mental condition was during the whole 24 hours. Dr. Sinnadurai also expressed the view that there could have been certain transient periods when the deceased might have been alert for a little time.

Dr. Daljit who himself attended to the deceased, testified at great length and in his testimony he conceded, commenting on the deceased's mental condition, that it was not minute to minute from 13th to 18th that the deceased did not know what he was doing. There were times during these days that he would have known for very short periods what he was doing. He went further to say that the duration of these periods when he knew what he was doing could be attested by a person observing at that time.

Dr. Daljit conceded that the deceased made some visits to the toilet to urinate and the deceased's ability to walk to the toilet and back could mean that he knew what he was doing. He, however, qualified by saying that whether he knew what he was doing depended on how complicated the act involved was. In the instant case, I find that there was evidence to show that the deceased had not only walked to the toilet but had also urinated in a container specially provided for the collection of urine indicating that he knew what he was doing. There was also evidence to show that the deceased had complained of cough and had also got out of bed to stand at the window.

Apart from the medical evidence, there was the testimony of the plaintiff who said that the deceased was never conscious at all and that at no time during

her visits did the deceased ever utter any word. I find this hard to believe.

I shall now proceed to examine the defence on this point. It is the defendant's case that the entire sum transferred from the deceased's account in the Head Office of the defendant bank into the joint account was on the authority of a cheque drawn by and which bore the thumbprint of the deceased. The entire sum went to one Chan Yoke Ying, the deceased's wife. Neither Chow Yee Wah the deceased's brother-in-law nor the bank received any part of the money.

Mr. Shankar observed that although the statement of claim contained lengthy statements setting out allegation after allegation, there is in fact only one substantial allegation, namely, whether the deceased was already dead or unconscious or was so ill that he did not know what he was doing when the thumbprints were obtained.

Kwan Mun Koh testified that the first intimation he received of the deceased's desire to open a joint account with Chow Yee Wah was on July 11, 1967 from the deceased himself at the deceased's flat. He paid a visit at the request of the deceased through Chan Yoke Ying. Desirous of making some provision for his wife, deceased wanted the money in the Head Office transferred to the joint account. If anything should happen to him, Chow Yee Wah was to look after his wife. Deceased requested Kwan Mun Koh to tell Chow Yee Wah. According to Kwan Mun Koh, his uncle (deceased) had in the past asked him to put money into and draw money from his account.

On July 12th Kwan Mun Koh again saw the deceased at the deceased's flat. The same evening Kwan Mun Koh told Chow Yee Wah at a party of the deceased's wish. Chow Yee Wah promised to see the deceased the next day. On the following day Kwan Mun Koh was told by Chow Yee Wah through the telephone that deceased was admitted to the General Hospital. When Kwan Mun Koh visited the deceased at the hospital on the same day, he explained to the deceased that he could not turn up the night before as Chow Yee Wah thought it was already too late.

Although Kwan Mun Koh was subjected to severe cross-examination by counsel for the plaintiff, he did not seem to have made any contradiction to his earlier testimony. Mr. Joginder Singh failed to shake his credit. I must say he impressed me as being a witness of truth. Apart from the impression I have formed of this witness, I find that his evidence is substantiated by equally reliable witnesses.

If I may for a moment digress, I propose to analyse the reasons why deceased had chosen Chow Yee Wah to be the co-holder and not someone else — not even Chan Yoke Ying. Deceased had good reason for not choosing his wife. Chan Yoke Ying was an illiterate woman and she only knew how to sign her name after she was taught by the deceased to do it. The deceased had undoubtedly considered it in her interest to entrust the money into the hands of Chow Yee Wah for her benefit if anything should happen to him. Chow Yee Wah was deceased's brother-in-law by his marriage to Loke Siew Eng, deceased's sister. At one time deceased stayed with Loke Siew Eng. The plaintiff herself stated that when deceased grew up, he stayed at his sister's house. It seems probable that Chow Yee Wah was, to the deceased, someone he could confide in. It is also revealed that the deceased was one of the administrators of the estate of his late father, and on the death of Loke Soh Keen, the third daughter of the late Loke Chow Kit, Chow Yee Wah and Loke Siew Eng became the executors of Loke Soh Keen. Together they handled the affairs of the estate of the late Loke Chow Kit. By reason of the close association deceased had with Chow Yee Wah coupled with the fact that Chow Yee Wah was his brother-in-law, the deceased had probably regarded Chow Yee Wah as the one person he could rely upon to look after the welfare of his wife.

I would in passing observe that although the plaintiff maintained that Chan Yoke Ying was not her son's legal wife, it is evident that deceased had been living with Chan Yoke Ying as husband and wife since 1961. In the eyes of the deceased, Chan Yoke Ying was his wife and to Chow Yee Wah, Kwan Mun Koh and Dr. Loke Wai Tuck, with the exception of the plaintiff, Chan Yoke Ying was the wife of the deceased. In my view, it is not really necessary for me to consider whether there was a valid marriage or for that matter the exact nature of the deceased's relationship with Chan Yoke Ying. Chan Yoke Ying was obviously someone deceased shared his life with at least from 1961 until he passed away. The question is was it really least expected that he would want to leave behind something for her?

After carefully considering the facts before me, I am quite convinced that it was the deceased's earnest wish to make some sort of provision for his wife. It may have crossed the deceased's mind that Chan Yoke Ying might not receive anything on his death if she should be excluded as a beneficiary. The plaintiff's attitude towards Chan Yoke Ying had probably left very little doubt in the deceased's mind that she would after his death do everything within her power to get Chan Yoke Ying excluded as a beneficiary. It should also be remembered that deceased left no issue and the only person who would benefit on the deceased's death, other than Chan Yoke Ying, would be the plaintiff. There is abundant of evidence to show that deceased disliked his mother and she in turn hated Chan Yoke Ying. Plaintiff's description of Chan Yoke Ying gives me the impression that she really detested her. In her estimation Chan Yoke Ying was responsible for taking away the deceased from her and she too was the cause of the deceased's dislike for her. She seemed very bitter and was prepared to go to any length, to lie, if necessary, in order to win the case and deprive Chan Yoke Ying of the money left by the deceased. In her testimony the plaintiff had this to say of Chan Yoke Ying, "My son's money means a lot to me.... My son should not have brought this kind of woman home — Chan Yoke Ying was one — woman from a massage parlour. It was bad of him to keep a woman of this type during his lifetime." In view of this, it is not unreasonable to assume that the deceased was fully conscious of his mother's attitude and he was therefore

quite anxious to see that his wife would be well taken care of after his death.

To summarise very briefly, I would say that in the light of the testimony of Kwan Mun Koh, Chan Yoke Ying and Chow Yee Wah, I am fully satisfied that even before the admission to the General Hospital, the deceased had in fact made up his mind to open a joint account with Chow Yee Wah to facilitate Chow Yee Wah the use of the fund for the benefit of Chan Yoke Ying after his death. I hasten to add that there is also abundant of evidence before this court to show that the fund was indeed utilised solely for her benefit after his death. In arriving at my finding, I have taken into consideration the testimony of Dr. Loke Wai Tuck — a nephew of the deceased. He saw the deceased on July 13th at the request of Chow Yee Wah. After examining the deceased, he made arrangement for his uncle to be admitted to the General Hospital. Subsequently Chow Yee Wah got in touch with him saying that the deceased had asked him to open a joint account. As a result, Dr. Loke Wai Tuck inquired about it from the deceased. Deceased told him that he had spoken to Chow Yee Wah and it was being carried out, i.e. the financial matter was being attended to.

Kwan Mun Koh saw the deceased on July 11th. Except for the swollen leg, deceased appeared to him to be normal. A reliable indication of the deceased's condition before and on admission may be gathered from the evidence of Dr. Loke Wai Tuck. Deceased walked unaided but very slowly. Mentally he was fully alert except that he stammered. This it would seem was his manner of speech. Dr. Loke Wai Tuck kept a case history card and referring to the deceased's condition on July 13th he said, "I noticed he was short of breath. I thought he was seriously ill and told him I had to put him in hospital. I examined him all round. My uncle was gasping for breath after coming out from the bathroom, having to go down the stairs."

It is revealed that for two months prior to July 13th, the deceased had diarrhoea six to ten times a day and that weakened him. Dr. Loke Wai Tuck gave a description of the condition of the deceased as he found him on July 14th, 15th, 16th and 18th. In his view, the deceased's mental condition at those times he saw the deceased was normal. Deceased appeared to possess his full mental faculties and was neither in a confused state of mind nor in a state of drowsiness. Dr. Loke Wai Tuck also said that the condition was about the same except the last two days when deceased's condition deteriorated and deceased was asleep at the time of his visits.

I shall now proceed to determine whether at the time deceased drew the cheque and executed the documents authorising the opening of the joint account, he was of sound state of mind and knew what he was doing. Evidence concerning the mental state of the deceased at the relevant time is to be found solely from the testimony of the defence witnesses.

The first defendant identified the cheque and the documents the deceased had affixed his thumbprints on July 18th. On the morning of the 18th, he discussed with Dr. Loke Wai Tuck concerning deceased's wish to open a joint account. Subsequently he saw Kwan Mun Koh and they agreed to meet at the hospital at five in the afternoon. On arrival at the hospital, Chow Yee Wah saw the deceased sitting on the edge of the bed with his legs dangling. Chan Yoke Ying was with the deceased. Soon after Kwan Mun Koh arrived. On arrival Kwan Mun Koh inquired from the deceased concerning the opening of the joint account. The documents were handed to the deceased after they had been filled up by Kwan Mun Koh. The cheque also bears the handwriting of Kwan Mun Koh. Deceased could not sign because his hands were swollen and inquired whether he could use his thumbprint. Kwan Mun Koh consented. Deceased affixed his thumbprints on both the cheque and the documents. Chow Yee Wah, the co-holder of the joint account, signed the documents on July 20th at the bank as he did not have in his possession his identity card on that day.

The evidence of Chow Yee Wah is substantiated by the testimony of Kwan Mun Koh and Chan Yoke Ying. I have examined the evidence of Kwan Mun Koh and Chan Yoke Ying including the testimony given under cross-examination very carefully. I am fully satisfied that they were telling the truth. I do not think there is any need for me to repeat what they said. Suffice for me to say that on the evidence given by them, I am satisfied that the deceased knew what he was doing when he drew the cheque and gave the authority to open a joint account. I am also satisfied that he was not in any way deceived into affixing his thumbprints. I am further satisfied that he was then of sound memory and understanding and that he fully appreciated the nature and effect of his act. Mr. Shankar referred to the day-to-day happenings at the hospital prior to and after the 18th which, it is submitted, support the defendants' contention that the deceased was not, contrary to what the plaintiff is endeavouring to show, of unsound mind, memory and understanding. To my mind, these incidents lend weight to the defendants' contention that though the deceased was seriously ill and his mental faculties were somewhat impaired, he was not completely relieved of his mental faculties his memory and understanding.

Kwan Mun Koh and Chow Yee Wah merely carried out the deceased's instruction. Chow Yee Wah was entrusted with the money for the benefit of Chan Yoke Ying and he indeed used the money for her benefit. There is not a shred of evidence to show that Chow Yee Wah had used it for his own or someone else's benefit.

Allegation is made that the cheque was obtained from the deceased by the defendants by exerting undue influence on the deceased. On careful analysis of the evidence, I am unable to find any evidence at all to support the allegation and I do not suppose I am wrong in saying that the plaintiff has completely failed to produce any evidence from which the court can reasonably conclude the exertion by the defendants of undue influence upon the deceased. Mr. Joginder Singh drew my attention to section 16 of the Contracts (Malay States) Ordinance, 1950 which reads —

"16. (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will

of the other and uses that position to obtain an unfair advantage over the other."

I am obliged to counsel for drawing my attention to this section. However, on the evidence before me, even after taking into consideration the close relations that existed between Kwan Mun Koh, Chow Yee Wah and Chan Yoke Ying and the deceased, I am no less satisfied — to use the words of Lord Hailsham L.C. in *Noriah* v. *Shaik Allie*,[2] — that "the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of free exercise of the donor's will."

There is also allegation of fraud but no evidence has been adduced to substantiate the allegation. With respect, I am unable to conclude that fraud has been perpetrated. There is to my mind no merit whatever in the allegation. It is insufficient to merely state a bare allegation without setting out the material particulars relating to the alleged fraud.

I have considered the cases cited by the plaintiff's counsel in support of his submission that fraud need not be proved by direct affirmative or positive evidence but may be proved by circumstantial evidence. Mr. Joginder Singh has stated the law correctly; however, judging from the passage in *Kerr* on Fraud and Mistake, 7th edition, page 672/3, it would seem that "care must be taken not to draw the conclusion hastily from premises that will not warrant it; but a rational belief should be discarded because it is not conclusively made out." In the instant case, the facts established have not, in my view, afforded a sufficient and reasonable ground for drawing the inference of fraud and the documents, as they stand, do not point to the defendants having been fraudulent.

It is further alleged by the plaintiff that the authority given to the second defendants to honour the cheque and/or to open the joint account by the deceased was revoked by the subsequent mental condition and/or mental disorder of the deceased by the deceased being of unsound mind, memory and understanding. In reply Mr. Chan Siew Yoon cited to me the following passage from *M.S. Parthasarathy's* cheque in Law & Practice at page 102 where it is stated —

"Hence, when a banker gets notice of mental disorder of his customer, which would amount to incapacity to manage his affairs, he should stop payment of all cheques drawn by such a customer, until the customer recovers or instructions are received from the court. If the banker comes to know that his customer has been admitted into a mental hospital or if he is informed by a relative of the customer that the latter is not mentally sound, the banker is put on enquiry; he cannot, however, dishonour cheques drawn by the customer unless he is certain that the mental disorder would affect the customer's capacity to manage his affairs."

It would appear that —

"The test of mental derangement of any person is whether it amounts to incapacity to manage his affairs, but, in the absence of a medical report, it is not easy to apply in practice. The safest course is to continue to honour cheques until such time as the customer is certified under the Lunacy Act, 1890, or becomes a patient in the home." (*L.C. Mathew* on Banker and Customer Relationship and the Accounts of Personal Customers at page 125).

I have concluded that the joint account was opened on July 20th and this was done pursuant to the authority given by the deceased on July 18th and that the defendant bank quite rightly acted upon that authority. In that event I fail to see how that authority can be deemed to have been revoked by the deceased's subsequent condition when it is never established, and I do not indeed find as a fact, that subsequent to the 18th, deceased was completely deprived of his full mental faculties. There was, therefore, no reason for the defendants to disobey the instruction which had been freely and voluntarily given by the deceased.

In this regard, it is perhaps appropriate for me to refer to the evidence of Mr. M.K. Ramachandran concerning the normal banking practice relating to the opening of an account.

Though a bank, as a rule, usually follows certain established practices, it is clear that the rule is not applied very rigidly and the practice may vary depending on the circumstances of each particular case. In the instant case, for example, the deceased was neither a stranger to the defendant bank nor unknown to Kwan Mun Koh. Besides deceased already had an account at the Head Office. Kwan Mun Koh had therefore, acted properly when he consented to the deceased's request to affix his thumbprints instead. The deceased seemed to him to be in possession of his mental faculties and had not appeared to be irrational.

At this point, may I refer to the suggestion made by the plaintiff that the practice is to block payment on a joint account if one of the joint holders dies until clearance is obtained from the Estate Duty Office. I agree with Mr. Shankar's submission that the money was still in the full possession of the bank and its subsidiary at all material times and therefore no clearance from the Estate Duty Office was required for this.

It is also convenient at this point, to comment on the submission made by Mr. Joginder Singh that where a deceased person is alleged to have made a gift of property during his lifetime and such gift is challenged, the onus of proof lies upon the donee or other person claiming the gift to show rightousness of the transaction, to remove any and all suspicious circumstances surrounding the making of the gift and to establish that the donor had the requisite mental capacity to make the gift. The gift in the instant case was in the form of money left to Chow Yee Wah for the benefit of Chan Yoke Ying, and the circumstances under which the gift was made have already been dealt with earlier on. To my mind, there were no suspicious circumstances surrounding the gift and furthermore there were no significant evidence from which I could infer that the gift had been improperly made. On the contrary, I found as a fact that the deceased had the requisite mental capacity to make the gift. It may perhaps be pertinent to observe in passing that Chan Yoke Ying, the donee, has not been made a party to the proceedings.

In the present case, the deceased made an unequivocal declaration that if anything should happen to him, the money in the joint account was to be used by Chow Yee Wah for the benefit of his wife Chan Yoke Ying. Though the deceased had a vested right over the money before his death, it would seem clear that such money was vested in the survivor of

the joint account as trustee entrusted with the money for the benefit of Chan Yoke Ying on the death of the deceased.

Mr. Joginder Singh pointed out to certain facts and argued that there were suspicious circumstances surrounding the alleged gift. I do not propose to deal with each and every point submitted by Mr. Joginder Singh. It will suffice if I say that suspicion cannot be inferred from the fact that no solicitor's advice was made available when deceased decided to open a joint account and similarly from the fact that no doctor was in attendance when the thumbprints were taken.

It is argued that the only persons present at the time the thumbprints were taken were those against whom charges of dishonesty and undue influence were levelled. That is not exactly true. No charges have been made against Chan Yoke Ying. As for Kwan Mun Koh, I fail to see any reason why he should want to exert his influence upon the deceased.

It is true that no medical advice was sought but the question did not seem to arise. They all had no reason to doubt that deceased did not know what he was doing. Dr. Loke Wai Tuck who saw the deceased on that day was satisfied that the deceased had sufficient memory and understanding and was in possession of his mental faculties.

Mr. Joginder Singh highlighted the evidence of Dr. Daljit when he (Dr. Daljit) said that —

"In my opinion, with reference to my notes and the nurses' notes, on 18th July, Yaik Hoe would not have been in a position to know what he was doing when he affixed his thumbprint. In my opinion, at no time at all, was the patient in a position to know what he was doing."

Dr. Daljit's evidence cannot be considered in isolation but regard has to be given to the whole of the evidence before me.

May I emphasize that my finding that the deceased fully consented to the opening of the joint account is consistent with the evidence showing that step was taken by the deceased to have a joint account opened prior to his admission to the hospital. To my mind, he was fully aware of what he was doing. In any event, there is no suggestion that before admission he was confused or of unsound mind or that he failed to appreciate the effect of the step he was taking.

Mr. Joginder Singh attacked the defendants' story saying that the gift gives rise to suspicion as every defence witness maintained that deceased was in full possession of his mental faculties. Suffice if I say I have considered very carefully the evidence of each of these witnesses. I am satisfied that no attempt has been made by any of them to fabricate. I have cautioned myself of the need to be fully satisfied of the veracity of their testimony. These witnesses knew the deceased's habit and mannerism intimately, and, without meaning to discredit or to reject the doctors' testimony, I think Kwan Mun Koh and Chow Yee Wah have proved to my satisfaction that deceased knew the nature and effect of what he was doing when he affixed the thumbprints on the cheque and mandate. Indeed, I am satisfied of the propriety of the transaction.

On the question of mental incompetency of the deceased, Mr. Chan Siew Yoon referred to the test proposed by Cockburn C.J. in the well-known case of *Banks* v. *Goodfellow*.[3] It is submitted that although this case refers to mental competency in making a will, it will equally apply to a case of gift. Mr. Chan Siew Yoon is of the view that this case has no application to the instant case as it was only concerned with proof of a testamentary capacity in cases of a will. Nonetheless he feels that the case has laid down a few useful guides. At page 565 of that case, Cockburn C.J. said —

"It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

Mr. Chan Siew Yoon further submitted that whether the deceased had mental capacity or not is a question of fact for the court to decide. He urged the court to bear in mind the fact that a man might be in a state of extreme imbecility and yet he may possess sufficient understanding to direct how his property should be disposed of. He invited my attention to a passage in *Banks* v. *Goodfellow, supra*, where at page 567 Cockburn C.J. said —

"In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter part may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of."

Mr. Chan Siew Yoon argued that a man's memory may be very imperfect or that his mental condition may be impaired by age or disease and yet his understanding may be sufficiently sound for many of the transactions in life which include the distribution of his property. In support of his argument, Mr. Chan Siew Yoon referred to the following passage from *Banks* v. *Goodfellow, supra*, where Cockburn C.J. said —

"But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it in writing."

It is the contention of the defendants that the rationality of the disposition is indicative of possession of faculties. Deceased had intended to make a disposition to Chan Yoke Ying who, to him, was his wife and the object of his affection and regard. Cock-

burn C.J. in *Banks* v. *Goodfellow, supra,* made the following observation —

"The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection."

Mr. Chan Siew Yoon cited two other cases — *Smee* v. *Smee*[4] and *Harwood* v. *Baker.*[5] Commenting on *Smee* v. *Smee, supra,* where the testator made a will in favour of his wife to the exclusion of his brothers, Mr. Chan Siew Yoon pointed out that the case has no application here as, firstly,. the testator there had a history of insanity; secondly, there was delusion which resulted in his omission to consider the claims of his brothers and sisters; thirdly, the will disposed of the whole fortune of the testator.

In the case of *Harwood* v. *Baker, supra,* it is submitted that the reason for the decision in that case will find no place in the instant case. There the testator made a will in favour of his wife to the exclusion of other next-of-kin. That will was made two hours before he lost consciousness and five hours before his death. Before illness, he had expressed intention of distributing a large portion of his property among his relatives.

Referring to the facts of this case, it is pointed out that the deceased's intention to provide for his wife was formed before his admission to the hospital. Deceased read the documents and cheque before affixing his thumbprint. Deceased's closest relatives were his wife and aged mother and the money left to his wife was not his entire fortune. There was a strained relationship between him and his mother.

Mr. Joginder Singh referred to equity and the rule of survivorship and submitted that the right of survivorship vested in the first defendant is overridden by equity. It is the plaintiff's contention that only the deceased provided the money for the joint account and the first defendant none and therefore the money standing to the credit of the joint account should lawfully belong to the estate of the deceased.

I am inclined to agree with Mr. Chan Siew Yoon's submission that equity may intervene but only to presume that the survivor is holding the money as trustee in favour of the estate (see *Russel* v. *Scott*[6] per Dickson and Evatt JJ). The presumption, it is argued, only affects burden of proof. Such presumption may be displaced by an affirmative proof of specific intention to confer a beneficial interest.

In this connection the court must I think, have due regard to the purpose for which the money was transferred to the joint account. Deceased knew what he was doing when he executed the various documents. The transfer of the money to the joint account was specifically for the purpose of conferring a beneficial interest on Chan Yoke Ying in the event of his death. Clearly therefore the survivor should be entitled to the balance standing to the credit of the account, not for himself and not for the estate, but for the widow Chan Yoke Ying.

Mr. Joginder Singh also submitted that when a banker unlawfully paid out funds for his customer, the banker commits the tort of conversion. As for the present case, it is his contention that the defendant bank acted negligently and/or in bad faith and/or outside the ordinary course of business. He urged the court to consider the fact that the specimen signature card at the Head Office does not bear the thumbprint whilst the cheque (D18) bears it and despite the deviation D18 was paid out without an enquiry. I have at some length dealt with this point earlier on and have also made a finding that Kwan Mun Koh the servant of the defendant bank had not acted improperly in allowing the deceased to affix the thumbprint. I have also found that the circumstances surrounding the taking of the thumbprint were not surreptitious. On the evidence before me, I do not hesitate to say that basically as an officer of the defendant bank in the branch office he had not acted improperly when he admitted the signature of the deceased even though he did not do so at the time of payment.

It is Mr. Joginder Singh's contention that there was a deviation from normal practice. There might have been but it was stated very clearly by Mr. Ramachandran (PW9) who was called by the plaintiff to testify that the rules are rules of prudence and it is possible the practice from bank to bank might vary in its details. If the bank manager is satisfied with the identity of the person and that person has full faculties of his mind, he can accept a thumbprint in place of the signature if for some reason he was unable to do it. The bank is only put on an enquiry if there is something to arouse its suspicion that a customer's faculties of mind are not all there. Furthermore, it would seem that these rules are designed for the protection of the banker — a protection that banks require from an account holder. In these circumstances, I do not see how the defendant bank could be said to have acted negligently. I am also unable to find that the defendant bank had acted in bad faith. I should emphasize that the whole transaction, in my view, was conducted by the defendant bank in good faith and without negligence and not outside the ordinary course of business.

As an alternative to the claim under the head of conversion, Mr. Joginder Singh submitted that even if the collection of the cheque (D18) by the second defendants did not constitute conversion, the fact that deceased had separate authority and dominion over the fund in the joint account by reason of D19 entitles the plaintiff as administratrix on behalf of the estate to call for the sums standing to the credit in the joint account. In other words, she can do by way of claiming the money had and received by the second defendants from the deceased.

Mr. Chan Siew Yoon, on the other hand, argued that the second defendants received the money belonging to the deceased since the second defendants were payees of the amount with instruction to pay it into the new joint account of the deceased and the first defendant. But for the plaintiff to recover the money, the receipt by the second defendants must be under such circumstances as to create a privity between the second defendants and the plaintiff. (See *Sanjiva Row's* Contracts 7th edition, Volume II 1968 page 1818).

It is further argued that the present case does not fall within any of the circumstances that would

create privity to support an action for money had and received by the second defendants.

It is the contention of the second defendants that in this case, they received the payment of the cheque for the benefit of the deceased and the first defendant (who is the third party) jointly. The money so received could only be applied to the joint account, which is the purpose for which the deceased paid the bank in the first place and not for any other purpose. If the bank had continued to hold the money so paid over in the sole account of the deceased instead of as directed, then it would clearly be held liable for money had and received to the first defendant who, upon the death of the deceased became the sole legal owner of the sum in question by reason of the rule of survivorship.

To sum up, I would say that in the present case, there is not the slightest doubt in my mind that the deceased had the necessary intention from the very beginning, concerned with the welfare and interest of his wife in the event of his death, to make provision for her while he was still alive. Why he decided to authorise the opening of the joint account with Chow Yee Wah and the transfer of the money into the joint account with a view that the money would be utilised for his wife's benefit in the event of his death is something that only the deceased himself could say. I can only assume in view of the illness he might not live long. He had probably thought that the chances of his surviving his illness were quite slim.

It is true that the gift was contingent in the sense that she would only be entitled to benefit on the deceased's death, and, that if the deceased should recover from his illness, the money would still be his. Nevertheless, I am fully satisfied that in law, Chow Yee Wah, having been specifically directed to apply the money solely for Chan Yoke Ying's use, was a lawfully constituted trustee to hold the money in trust for the benefit of Chan Yoke Ying.

May I now refer to a case cited by Mr. Chan Siew Yoon — *Russel* v. *Scott, supra* — where at page 454 Dickson and Evatt J.J. said —

"For it is said that the deceased's intention that her nephew on surviving her should take the amount of the bank account is a testamentary wish to which effect could be given only by a duly executed will. This must mean that, while retaining full beneficial property in a corpus, she intended that on her death some other person should succeed to her property in that corpus or to some interest therein to which he was not before entitled either absolutely or contingently, and to which the law gave him no title to succeed. It is only in this sense that an intention to benefit can be said to be testamentary. Law and equity supply many means by which the enjoyment of the property may be made to pass on death. Succession post-mortem is not the same as testamentary succession. But what can be accomplished only by a will is the voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased. This was not true of the chose in action created by opening and maintaining the joint bank account."

Before I conclude may I say that I am entirely in agreement with Mr. Chan Siew Yoon's submission that there is in the instant case a completely constituted trust. The law dealing with the constitution of voluntary trusts is to be found in the most celebrated case of *Milroy* v. *Lord*[7] where Turner L.J. at page 1189 said —

"... I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift."

I am further in agreement with Mr. Chan Siew Yoon's submission that the fact the deceased might revoke the trust in the event of his recovering from his illness would not make any difference as it would seem clear from the following passage in the judgment of Starke J. in *Russel* v. *Scott, supra* —

"Thus a voluntary settlement vesting property in trustees for the benefit of the donor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary: it takes effect immediately upon its execution, and is not postponed until after the donor's death."

In conclusion, I would say that it is my considered judgment that for reasons that I have stated, having regard to the whole of the evidence adduced before this court, I find no merit in the plaintiff's claim. I would therefore dismiss the plaintiff's claim against both defendants with costs.

Claim dismissed.

Solicitors: *Joginder Singh & Co.; Shearn Delamore & Co.; Shook Lin & Bok.*

LOW AI BEE v. RALPH EU PENG LEE

[O.C.J. (Abdul Hamid J.) November 30, 1973]

[Kuala Lumpur — Civil Suit No. 746 of 1971]

Family Law — Separation agreement — Provision for payment of maintenance — Whether agreement enforceable — Polygamous marriage.

In this case the plaintiff claimed sums due to her under a separation agreement entered into between her and her husband, the defendant. It was contended by the defendant that the agreement was not enforceable as the marriage which was according to Chinese rites and customs was a potentially polygamous one.

Held: the court had jurisdiction to enforce the agreement as although the marriage was potentially polygamous it was recognisable in law as a valid marriage.

Case referred to:-

(1) *Shahinaz* v. *Rizwan* [1964] 2 All E.R. 993.

CIVIL SUIT.

Chin for the plaintiff.

D'Cruz for the defendent.

Abdul Hamid J.: The plaintiff is claiming certain sums of money which the defendant agreed to pay under an agreement entered into between her and the defendant some time in January, 1971.

Briefly the facts are as follows — The plaintiff was married to the defendant according to Chinese rites